STATE OF MICHIGAN

COURT OF APPEALS

ANGELA R. ROSA and JOHN B. ROSA,

Plaintiffs-Appellees,

v

GARY HENNING,

Defendant-Appellant.

UNPUBLISHED
May 31, 2007

No. 268651
Benzie Circuit Court
LC No. 05-007272-NO

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's orders entering a default judgment against him, and denying his motion to set the default aside. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Defendant, a resident of Florida, owned a fenced and boarded-up structure on Main Street in Honor, Michigan. Plaintiff Angela Rosa filed a premises liability action in February 2005, asserting that she was injured by a hazardous condition on that property. Plaintiff John Rosa, her husband, alleged loss of consortium.[1]

Plaintiffs attempted to notify defendant of the proceedings against him via several mailings, certified and regular, sent to defendant at Box 9952, Panama City, Florida, 32417. The certified mail went unclaimed, and the regular mail was neither answered nor returned. The trial court eventually allowed service of process by posting and first class mail, but defendant still did not respond.

On June 1, 2005, the court entered a default judgment in the amount of $125,152.25. The trial court sent notice of that judgment to defendant, at the same address through which plaintiffs had attempted to achieve service. Defendant acknowledges that he received that mailing, but insists that this was the first he learned of the suit.

[1] Because John Rosa's interest in this case is derivative of that of Angela Rosa, references to the singular plaintiff in this opinion will refer exclusively to Angela.

On June 20, 2005, defendant filed an objection to the judgment, and a motion to set aside the default, asserting lack of actual notice. Defendant additionally offered affirmative defenses, including that plaintiff was a trespasser to whom he had no duty.

Plaintiffs scheduled a deposition of defendant for October 14, 2005, then rescheduled, to accommodate defendant's schedule, for November 23, 2005. Defendant neither objected nor appeared.

After hearing arguments on defendant's motion on February 7, 2006, the trial court stated that defendant might have a meritorious defense, but added:

> the problem is, you know, [defendant], consistent with his past conduct, doesn't even show up for the deposition when they want to try and ask him some questions about it. And I would say that seems to be fairly typical of—if it seems to be legal mail, he's not interested. We've been through this before with [defendant] in other cases.
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> I made [plaintiffs' counsel] come in because I wasn't satisfied with the trail he left trying to get service. And . . . he made a showing and convinced me, but I had remarked then about [defendant]'s penchant for not wanting to pick up his mail if it appeared to be a legal filing against him. So particularly in light of his failure to show up for the deposition related to this very motion, the Court will deny the motion to set aside the default.

We review a trial court's decision on a motion to set aside a default or a default judgment for a clear abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

"A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). Good cause is "a procedural irregularity or defect," or "a reasonable excuse for failure to comply with the requirements that created the default . . . ." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999).

Defendant first argues that the mailed notices were deficient for using the wrong address. Defendant asserts that he uses an address in Panama City Beach, Florida, but that plaintiffs sent all their mailings to Panama City in that state. However, it is undisputed that plaintiffs consistently used the correct Post Office Box No., 9952, and ZIP code, 32417.

We take judicial notice of the following information, gathered from the official website of the United States Postal Service, http://zip4.usps.com/zip4/welcome.jsp. Although the 32417 ZIP code applies to Panama City, Panama City Beach is an acceptable variant. It seems clear that where defendant's correct name, box number, state, and ZIP code were used, defendant's

mail would be properly delivered whether the city was given as "Panama City" or "Panama City Beach."

Defendant has failed to show that plaintiffs' use of Panama City, instead of Panama City Beach, in their attempts to serve process on him was an irregularity excusing him from his duty to defend.

Defendant alternatively argues that his travel schedule would have kept him from receiving the mailed notices even if they were delivered to the correct address. However, defendant does not specifically assert that he was absent from his Florida address at the times of the mailings, nor does he provide evidence of travel during those time periods. Defendant's purported travel schedule is not a reasonable excuse for the claimed failure to receive plaintiffs' mailings.

Defendant next argues that the posted notice that was used in this instance was deficient. MCR 2.106(E) authorizes a trial court to order service of process by mailing and posting. Subrule (1) requires "posting a copy of the order in the courthouse and 2 or more other public places as the court may direct . . . ." In this case, the order allowing for posted notice specified "posting . . . at the Benzie County Courthouse, the United States Post Office in Honor, Michigan and Defendant's property located at 10889 Main Street, Honor, Michigan."

Defendant argues that posting on his property did not satisfy the requirement for posting at a public place. However, defendant does not suggest that the posting at his property was not in plain view to the general public. The purpose of notice is to inform a person of a threat to his or her interests, and to provide that person an opportunity to respond. See *Dow v Michigan*, 396 Mich 192, 205; 240 NW2d 450 (1976). Notice should take the form of "efforts one desirous of actually informing another might reasonably employ." *Id.* at 211. We find that "public place" for purposes of posted notice simply means a place where the general public is likely to see a notice. The Main Street address of defendant's property indicates that notice posted there was accessible to the public; absent evidence to the contrary, we find this sufficiently public to satisfy MCR 2.106(E).

Defendant also argues that plaintiffs obtained their judgment through fraud. MCR 2.603(D)(3) states that a default may be set aside for the reasons set forth in MCR 2.612, whose subrule (C)(1)(c) specifies fraud as a ground for relief from judgment. Defendant argues that because plaintiff admitted to a third person that she fell down was because she was drunk, the assertion that defendant is at fault is fraudulent. However, while intoxication may have therefore been a factor in the fall, we cannot say that it was the exclusive reason for it. A dangerous condition on defendant's property may also have contributed substantially to the fall. Defendant has failed to produce evidence that plaintiffs had no good-faith basis for hoping to prevail in their lawsuit. We find no fraud.

Defendant next argues that the trial court improperly denied his motion out of passion or bias. Again, we disagree.

The trial court stated that defendant's history of not responding to plaintiffs' mailings was "consistent with his past conduct," adding, "[w]e've been through this before," and spoke of defendant's "penchant for not wanting to pick up his mail if it appeared to be a legal filing

against him." Defendant argues that these statements indicate bias. However, the trial court did not simply refuse to allow defendant to contest the default judgment, but instead entered an order giving him time to file a brief in support of his motion to set the default aside. At the hearing on the motion, the court reported how it earlier "wasn't satisfied" with plaintiffs' attempt to achieve service, and that its intention to consider the results of a scheduled deposition was frustrated for defendant's failure to appear for it. This record does not show that the trial court set aside its reasoned judgment in deference to passion or bias in denying defendant's motion to set aside the default.

Defendant argues that the trial court erred in faulting him for failing to appear for the November 2005, deposition for which he was subpoenaed, on the ground that there was no indication that his travel expenses would be paid. This argument is without merit.

MCR 2.305(C)(3) provides that a "court may order" a nonresident defendant to appear in Michigan for a deposition "on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending." This wording authorizes a court to order reimbursement of travel expenses, but does not mandate such accommodation. Nor does defendant cite authority for the proposition that a nonresident party subpoenaed for a deposition may simply disregard that subpoena if he or she is not promised reimbursement of attendant expenses. The trial court did not err in noting defendant's failure to appear for his deposition as another instance of his willful failure to defend this action.

We find no abuse of discretion in the trial court's decision to deny defendant's motion to set aside the default judgment.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff